MOHAMAD FAUZI RIDZWAN & ANOR A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
JAMES FOONG JCA
[CRIMINAL APPEAL NO: P-05-51-01]
18 OCTOBER 2005 C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Appeal against conviction and sentence - Whether 1st appellant guilty of trafficking within definition of s. 2 - Whether prosecution succeeded in making out a prima facie case against* D *1st appellant - Whether prosecution succeeded in proving its case beyond reasonable doubt against 2nd appellant - Dangerous Drugs Act 1952, s. 2*

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence, against* E *- Whether 1st appellant guilty of trafficking within definition of s. 2 - Whether prosecution succeeded in making out a prima facie case against 1st appellant - Whether prosecution succeeded in proving its case beyond reasonable doubt against 2nd appellant - Dangerous Drugs Act 1952, s. 2*

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WORDS & PHRASES: *"Trafficking" - Dangerous Drugs Act 1952 - Definition of*

The 1st and 2nd appellants were charged, together with two other accused persons, with trafficking in dangerous drugs (ganja), G an offence punishable under s. 39B of the Dangerous Drugs Act 1952 ('the DDA'). At the close of the prosecution's case, the other two accused (the 1st and 4th accused) were acquitted and discharged without their defences called. The 1st and 2nd appellants were asked to enter their respective defences and were, H thereafter, found guilty as charged and sentenced to death. They then appealed against both conviction and sentence. The 1st appellant raised two pertinent grounds in this appeal, which were: (1) that the learned trial judge had erred in attributing guilt upon the 1st appellant for his role as an introducer to the actual I supplier when another co-accused, one Kan, who had played a similar role, was acquitted and discharged; and (2) that the

learned trial judge had erred in finding the 1st appellant guilty of trafficking in ganja by "procuring" when the act of the 1st appellant did not justify it. The 2nd appellant raised the following grounds: (i) that the prosecution had failed to prove beyond reasonable doubt that the exhibits taken from the scene of the crime were those sent to the chemistry department for analysis and which were subsequently produced before the trial judge; (ii) that the failure of the prosecution to cross-examine the 2nd appellant on his defence was tantamount to an acceptance by the prosecution of that crucial piece of testimony, which meant that the learned trial judge had misdirected himself in finding the 2nd appellant guilty; and (iii) that the learned trial judge failed to express in his judgment that the prosecution had: (a) proved a *prima facie* case beyond all reasonable doubt at the end of their case before calling the 2nd appellant to enter his defence; and (b) proved its case beyond all reasonable doubt (after the defence) before convicting and sentencing the 2nd appellant.

Held (allowing the 1st appellant's appeal but dismissing the 2nd appellant's appeal)

Per James Foong JCA:

[1] The learned trial judge had erred in acquitting one accused, without his defence called, whilst demanding another to enter his defence when the part played by both these accused persons in the same offence charged was similar in nature and context *viz*. the role of an introducer. When the learned trial judge found that the part played by Kan, as an introducer, did not fall within the ambit of "procuring", an act mentioned in the definition of "trafficking" under s. 2 of the DDA, then he ought to have made a similar finding for the 1st appellant and acquitted him of the offence charged since the role played by the 1st appellant, as the evidence revealed, was almost identical to that of Kan. The learned trial judge could not find one co-accused charged for the same offence under almost identical circumstances guilty and set the other free when both played similar roles with no material differences. For this reason, the learned trial judge had misdirected himself and on this ground alone, it was sufficient to warrant this court to allow the 1st appellant's appeal. (para 16)

[2] As declared by the learned trial judge, the 1st appellant only acted as an introducer for SP3, an agent provocateur, to Kan and no further. There was no evidence to prove that the 1st appellant had knowledge of the amount of ganja to be transacted, and without such knowledge, he could not be said to have discussed and reached an agreement with the supplier to supply the amount of drugs so specified in the charge of trafficking. On the evidence, he did not even know or at any time have any interaction with the 1st accused or the purported supplier. Hence, the learned trial judge had erred in concluding that the prosecution had made out a *prima facie* case against the 1st appellant for trafficking in the said ganja as charged. For this reason as well, the 1st appellant's appeal ought to be allowed. (para 27)

[3] There was no break in the chain of evidence with regard to the handling of these exhibits from the time they were taken out from SP3's car boot to the time when they were produced by the officer in charge of the police store nor were there any suspicious circumstances to infer that they were tampered with. At each stage of handling, these exhibits were properly accounted for and were secured by those who had charge of them. Thus, there was no merit to this ground of complaint by the 2nd appellant. (para 30)

[4] From the nature of the recording presented by the learned trial judge in this case on the entire testimony of this witness, it was clear that the prosecution had mounted a challenge over the crucial part of the 2nd appellant's evidence. Further, the 2nd appellant's version relating to this crucial part of his evidence was too incredible in the light of the evidence advanced in this case. Therefore, the exception to the general rule, that failure to cross-examine a witness on a crucial part of the case would amount to an acceptance of that portion of his evidence, applied in this case. (paras 40 & 41)

[5] The learned trial judge's findings were not only derived from his written judgment itself but also from the notes of evidence recorded by him on the case. He had given an extensive and in-depth analysis of all the evidence tendered by the prosecution and arrived at the finding that the prosecution had proven a *prima facie* case against the 2nd appellant before calling upon him to render his defence. Similarly, the learned trial judge had stated in the appeal record that the 2nd

A appellant had failed to cast any reasonable doubt on the prosecution's case and that the prosecution had proved it's case against the 2nd appellant beyond any reasonable doubt. (paras 44 & 45)

B *[1st appellant's conviction and sentenced quashed; 2nd appellant's conviction and sentence affirmed.]*

Bahasa Malaysia *translation of headnotes*

Perayu pertama dan kedua, bersama-sama dengan dua orang lagi,
C telah dituduh dengan kesalahan mengedar dadah berbahaya (ganja), suatu kesalahan di bawah s. 39B Akta Dadah Berbahaya 1952 ('ADB'). Di penutup kes pendakwaan, dua tertuduh yang lain tersebut (tertuduh pertama dan keempat) telah dilepas dan dibebaskan tanpa dipanggil untuk membela diri. Perayu pertama
D dan kedua telah diminta membela diri masing-masing, dan berikutnya didapati bersalah seperti pertuduhan dan dijatuhkan hukuman mati. Mereka merayu terhadap kedua-dua sabitan dan hukuman. Dalam rayuannya, perayu pertama membangkitkan hujah: (1) bahawa yang arif hakim khilaf kerana meletakkan kesalahan atas
E perayu atas peranannya sebagai introducer kepada pembekal sebenar, sedangkan rakan sepertuduhannya, seorang Kan, yang memain peranan serupa, telah dilepas dan dibebaskan; dan (2) bahawa yang arif hakim khilaf apabila mendapati perayu pertama bersalah mengedar ganja secara "procuring" kerana tindakan-
F tindakan perayu pertama tidak mewajarkan dapatan sedemikian. Perayu kedua membangkitkan alasan-alasan: (i) bahawa pendakwaan gagal membuktikan di luar keraguan munasabah bahawa eksibit-eksibit yang diambil dari tempat kejadian jenayah adalah eksibit serupa yang dihantar ke jabatan kimia untuk analisa
G dan dikemukakan di hadapan hakim bicara kemudiannya; (ii) bahawa kegagalan pendakwaan untuk memeriksa balas perayu kedua atas pembelaannya bererti pendakwaan telah menerima akan keterangannya itu, sekaligus menyebabkan yang arif arif salah apabila mendapati perayu kedua bersalah; dan (iii) bahawa yang arif
H hakim bicara gagal menyatakan dalam penghakimannya bahawa pendakwaan telah: (a) membuktikan suatu kes *prima facie* tanpa keraguan munasabah di akhir kes mereka sebelum memanggil perayu kedua untuk membela diri; dan (b) membuktikan kes di luar keraguan munasabah (selepas pembelaan) sebelum mensabitkan
I perayu kedua dan menghukumnya.

Diputuskan (membenarkan rayuan perayu pertama tetapi menolak rayuan perayu kedua)
Oleh James Foong HMR:

[1] Yang arif hakim khilaf apabila membebaskan seorang tertuduh tanpa memanggil pembelaannya, tetapi memanggil yang seorang lagi untuk membela diri, sedangkan peranan yang dimainkan oleh kedua mereka dalam pertuduhan yang sama adalah serupa pada sifat dan konteksnya, iaitu sebagai seorang introducer. Apabila yang arif hakim bicara mendapati bahawa peranan yang dimainkan oleh Kan, sebagai seorang introducer, tidak termasuk dalam lengkongan perbuatan "procuring" di bawah s. 2 ADB, maka beliau harus membuat dapatan yang sama terhadap perayu pertama dan membebaskannya dari pertuduhan, kerana peranan yang beliau mainkan, seperti yang terserlah dari keterangan, hampir menyerupai peranan Kan. Yang arif hakim tidak boleh mendapati seorang rakan sepertuduhan bersalah, dan kemudian melepaskan yang seorang lagi, dalam keadaan di mana kedua-dua mereka dituduh dengan kesalahan yang sama, berada di bawah keadaan yang hampir sama, dan memainkan peranan yang serupa. Atas alasan ini, yang arif hakim bicara telah tersalah arah akan dirinya, dan atas alasan ini semata-mata, mahkamah sudah boleh membenarkan rayuan perayu pertama.

[2] Seperti yang dikatakan oleh hakim bicara, perayu pertama hanya bertindak sebagai seorang introducer antara Kan dan SP3, seorang agen provokatur, dan tidak lebih dari itu. Tidak ada keterangan bahawa perayu pertama mengetahui tentang jumlah ganja yang hendak ditransaksikan, dan tanpa pengetahuan sedemikian, beliau tidak boleh dikatakan sebagai telah berbincang dan mencapai persetujuan dengan pembekal untuk membekal jumlah dadah seperti yang tertera dalam pertuduhan. Berdasarkan keterangan, beliau langsung tidak mengetahui tentang pembekal yang dikatakan itu, dan tidak juga pada bila-bila masa pun membuat perhubungan dengan tertuduh pertama atau pembekal tersebut. Oleh itu, yang arif hakim khilaf apabila merumuskan bahawa pendakwaan telah membuktikan suatu kes *prima facie* mengedar ganja berkenaan terhadap perayu pertama. Atas sebab ini, rayuan perayu pertama harus dibenarkan.

[3] Tidak wujud kelompongan pada rentetan keterangan berhubung pengendalian eksibit-eksibit bermula dari masa ianya diambil dari but kereta SP3 sehinggalah ke masa eksibit-eksibit tersebut dikemukakan oleh pegawai yang menjaga stor polis. Begitu juga, tiada keterangan yang menunjukkan bahawa eksibit-eksibit tersebut telah diganggui. Eksibit-eksibit tersebut, pada setiap peringkat pengendaliannya, telah dijaga dengan baik oleh mereka-mereka yang diamanahkan untuk menjaganya. Oleh itu, bantahan perayu kedua berkaitan hal ini adalah tidak bermerit.

[4] Berdasarkan rekod rakaman yang dibuat oleh yang arif hakim terhadap keseluruhan keterangan perayu kedua, jelas bahawa bahagian penting keterangannya itu telah dicabar hebat oleh pihak pendakwaan. Selain itu, versi perayu kedua berkaitan bahagian penting keterangannya itu adalah terlalu mustahil mengambil kira keterangan yang dikemukakan di dalam kes ini. Oleh itu, pengecualian kepada kaedah am bahawa kegagalan memeriksa balas saksi atas keterangan pentingnya bererti menerima keterangan tersebut, terpakai kepada kes di sini.

[5] Dapatan-dapatan yang arif hakim bicara bukan sahaja dapat dilihat dari penghakiman bertulisnya tetapi juga dari nota keterangan kes yang direkodkan oleh beliau. Yang arif hakim telah menganalisa segala keterangan yang dikemukakan oleh pendakwaan dengan mendalam dan panjang lebar sebelum memutuskan bahawa pendakwaan telah membuktikan kes *prima facie* terhadap perayu kedua dan memanggilnya untuk membela diri. Begitu juga, yang arif hakim telah menyatakan dalam rekod rayuan bahawa perayu kedua gagal membangkitkan sebarang keraguan munasabah terhadap kes pendakwaan dan bahawa suatu kes di luar keraguan munasabah telah dibuktikan terhadapnya.

[Sabitan dan hukuman perayu pertama dibatalkan; Sabitan dan hukuman perayu kedua dikekalkan.]

Case(s) referred o:

Attorney-General's Reference (No 1 of 1975) [1975] 2 All ER 684 ***(dist)***
Ayoromi Helen v. PP [2005] 1 CLJ 1 CA ***(refd)***
Chow Kok Keong v. PP [1989] 2 AMR 1401 ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Cohen Lorraine Philis & Anor v. PP [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 SC ***(refd)***

Ng Chai Kem v. PP [1994] 2 CLJ 593 SC ***(refd)***
Noor Azahar Habin v. Rajaswari Sithampara Pillai & Anor [1991] 1 CLJ 151; [1991] 3 CLJ (Rep) 339 HC ***(refd)***
PP v. Leong Heo Cheong [1990] 2 CLJ 818; [1990] 2 CLJ (Rep) 738 HC ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 3 AMR 3457 ***(refd)***
PP v. Nik Ahmad Aman Nik Mansor [2002] 6 CLJ 369 HC ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 268
Dangerous Drugs Act 1952, s. 2

For the 1st appellant - R Palaniappan; M/s Palani
For the 2nd appellant - RSN Rayer; M/s R Nethaji Rayer & Co
For the respondent - Meor Hashmi Abdul Hamid

Reported by Suresh Nathan

JUDGMENT

James Foong JCA:

Introduction

[1] In this appeal before us, the 1st and 2nd appellants, who were the 2nd and 3rd accused, were charged together with 2 others in the High Court as follows:

> Bahawa kamu bersama-sama pada 17hb April 1998 jam lebih kurang 11.00 malam dihadapan Stesyen Minyak Shell, Jalan Masjid Negeri, dalam Negeri Pulau Pinang, didapati ada mengedar Dadah Berbahaya iaitu Ganja seberat 4,760 Gram dan telah melakukan kesalahan yang boleh dihukum dibawah Seksyen 39B Akta Dadah Berbahaya 1952.

[2] After the close of the prosecution case, the other 2 accused (1st and 4th accused) were acquitted and discharged without their defences called. The 1st and 2nd appellants were asked to enter their respective defences. Thereafter they were found guilty as charged and sentenced to death. They now appeal to this court against both conviction and sentence.

[3] After hearing submissions from their respective counsel, we unanimously agreed to: (a) allow the 1st appellant's appeal, quash his conviction and set aside the sentence of death; (b) dismiss the 2nd appellant's appeal, affirm his conviction and death sentence.

Background

[4] The background of this case is as follows: Instructed by his superior, detective sergeant Busra Abdul Kadir (SP3), as an agent provocateur, met the 1st appellant in Grik, Perak on 31 March 1998. Under the pretext of wanting to purchase ganja, SP3 discussed with 1st appellant for the supply. According to SP3, the 1st appellant informed him that he only distributed ganja in small packets of RM10 each and that his supplies came from Penang. SP3 went further to say that the 1st appellant informed him that if SP3 wanted supplies, he could recommend his friend from Penang to SP3. This meeting ended with both exchanging telephone numbers.

[5] On 10 April 1998, SP3 said that he received a call from the 1st appellant to meet in Penang the next day. Instructed by his superior to delay this meeting for a few days, SP3 replied to say that his car broke down and would not be able to be in Penang so soon. Then on 15 April 1998, SP3 said that the 1st appellant telephoned him again. This time, the 1st appellant requested to meet up the next day at Kebun Bunga in Penang.

[6] On 16 April 1998, the SP3 together with a team of police officers from Ipoh left for Penang. As arranged, SP3 on his own proceeded to meet the 1st appellant at the predetermined place. He was introduced to one Pak Long by 1st appellant. But the person whom they should meet was in fact Pak Long's nephew – Kan who did not show up. Since Kan was not present, SP3 said that he departed. But around 9pm on the same day 1st appellant contacted him by phone to meet at Pak Long's residence. This time, SP3 said that he went but on instruction from his superior brought along Detective Corporal Zainal, who went under the cover name of 'Zul' for this operation.

[7] In Pak Long's house, SP3 and Zul met Kan (the 4th accused). Together with 1st appellant, Kan and Zul, SP3 drove his car to a burger store at Jalan Perak, Penang under the direction of Kan. There, Kan met up with a man called Kudin (the 2nd appellant). SP3 claimed that the 2nd appellant got into his car and together with 1st appellant, Zul, Kan and himself drove to

Bayan Lepas. While in the car, SP3 and 2nd appellant negotiated for the sale and purchase of 5 kilogram of ganja at RM1,150 per kilogram to be delivered early next morning at a Muslim cemetery in front of the mosque at Kampong Dodol. Throughout this ride in SP3's car, neither the 1st appellant nor Kan participated in the negotiation between the 2nd appellant and SP3. Again before they parted for the evening, telephone contact numbers were exchanged between the 2nd appellant and SP3. Aside from this, SP3 asserted that both the 1st appellant and Kan requested to be picked up by SP3 for the actual delivery of the ganja set for the next morning. After this meeting, SP3 and Zul returned to the Rest House to brief their superior of what had transpired.

[8] At 5am on 17 April 1998, SP3 received a telephone call from the 2nd appellant informing him that the storekeeper for the ganja has yet to be located and promised to contact later. At 6.15am another call came from the 2nd appellant to SP3 to say that the said storekeeper for the said ganja was still not contactable. By 8.30am, the police party who came for this operation decided to return to Ipoh. On the way to Ipoh, SP3 received a telephone call from the 2nd appellant requesting him to return to Penang so that they could meet. On the instruction of his superior, SP3 arranged to meet in the evening between 9 to 10pm.

[9] The police party then returned to Penang and at about 9pm, SP3 telephoned the 2nd appellant to inform that he was about to arrive in Penang. At 10.30pm, the 2nd appellant telephoned SP3 and instructed SP3 to meet him at the same pre-determined place in Kampong Dodol. Upon this information, SP3's superior made necessary arrangement to lay an ambush.

[10] SP3 told the court that at about 10.30pm, he and Zul drove to the Muslim cemetery in Kampong Dodol. There he met the 2nd appellant who got into the rear passenger seat of his car. Following the directions of the 2nd appellant, SP3 drove into a lane at a fourth junction near to the place where they met. There were some houses and close to some nearby trees, SP3 stopped his car. He was requested by the 2nd appellant to open the rear boot of the car, which he complied. After that, all three of them got out of the car. Standing near the trees was a male whom the 2nd appellant approached and spoke to before being handed by this person 5 lumpy compact packets, wrapped in tin foils. After receiving this, the 2nd appellant deposited them in the rear boot

of SP3's car. The 2nd appellant, SP3 and Zul then got into the car and drove off. In the car, SP3 claimed that the 2nd appellant demanded payment for the ganja. While Zul was taking his time to count the money for the 2nd appellant, SP3 drove into a Shell service station that was predetermined with SP3's superior. There the 2nd appellant was arrested.

[11] The 5 packets of suspected drugs were later sent to the chemistry department and upon analysis found to be ganja, a dangerous drugs prescribed under the first schedule of the Dangerous Drugs Act 1952 (DDA), weighing 4,760 grams.

[12] The male person who handed these packets of drugs to the 2nd appellant was later arrested and charged together with 1st and 2nd appellants and Kan. He was the 1st accused.

1st Appellant's Appeal

[13] The 1st appellant has raised two pertinent grounds in this appeal: (1) that the learned trial judge has erred in attributing guilt upon the 1st appellant for his role as an introducer to the actual supplier when another co-accused, Kan, who had played similar role was acquitted and discharged; (2) that the learned trial judge has erred in finding the 1st appellant guilty of trafficking in the ganja by 'procuring' when the act of the 1st appellant does not justify it.

1st Ground

[14] In respect of the 1st ground, it is relevant to set out the learned trial judge's reasons for acquitting Kan without calling for his defence. According to the learned trial judge, Kan, a nephew of Pak Long was only involved in bringing SP3 and Zul to meet the 2nd appellant. Though Kan knew that the 2nd appellant agreed to supply the ganja to SP3 and, will take delivery of the same the next day at the Muslim cemetery and, had in fact requested to be physically present during the actual delivery the next morning the learned judge announced:

> Pada pertimbangan saya dalam keadaan sedemikan Kan bukanlah orang yang berusaha mendapatkan ganja itu dengan sekadar memperkenalkan Isa (SP3) kepada Kudin (2nd appellant). Kan tidak memainkan peranan yang menghasilkan jualan ganja itu kepada Isa, tidak seperti Ji (1st appellant) yang berusaha sungguh untuk mendapatkan ganja itu. Kan tidak terjumlah dalam definasi "pengedaran dadah" di bawah seksyen 2 Akta.

[15] With this, the 1st appellant's counsel argued before us that the learned trial judge should apply this same reasoning and acquit the 1st appellant since the role played by the 1st appellant is very similar to that of Kan. The 1st appellant was only an introducer and was not involved with the actual delivery of the ganja by the 2nd appellant to SP3 and Zul.

[16] We agree entirely with this submission of the 1st appellant's counsel. The learned trial judge, in our opinion, has erred in acquitting one accused, without his defence called, whilst demanding another to enter his defence when the part played by both these accused persons in the same offence charged is similar in nature and context *viz.* the role of an introducer. When the learned trial judge found that the part played by Kan, as an introducer, does not fall within the ambit of "procuring", an act mentioned in the definition of "trafficking" under s. 2 of DDA, then he ought to make similar finding for the 1st appellant and acquit him of the offence charged since the role played by the 1st appellant, as evidence revealed, is almost identical to that of Kan. The only minor variation is that the 1st appellant was the first person whom SP3 met for the supply of ganja and Kan came into the picture subsequently. But then, in terms of proximity to the actual supplier, Kan is closer since it was Kan who introduced SP3 to the 2nd appellant. The 1st appellant did not even know the 2nd appellant until being introduced by Kan at the same time as SP3. The learned trial judge cannot make selective finding against one co-accused charged for the same offence under almost identical circumstances guilty and set the other free when both played similar role with no material difference. For this reason, we find that the learned trail judge has misdirected himself and on this ground alone, it is sufficient to warrant us to allow this appeal of the 1st appellant.

2nd Ground

[17] For completeness we shall move on to deal with the 2nd ground raised by the 1st appellant. His counsel pointed out that the learned trial judge found the 1st appellant guilty of trafficking by the act of procuring, which is one of the acts of trafficking within the definition of s. 2 of the DDA, based on the fact that the 1st appellant brought SP3 and Zul to Kan who then in turn introduced them to the 2nd appellant, the purported supplier of the ganja. But procuring, according to the 1st appellant's counsel,

A requires the prosecution to prove that the 1st appellant was actually trafficking in the ganja and had the intention to do so. This, according to learned counsel, the prosecution has failed to do.

B **[18]** 'Trafficking' under s. 2 of the DDA:

> includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing
C any dangerous drugs.

[19] But in a series of judicial pronouncements (see the case of *PP v. Mohd Farid bin Mohd Sukis & Anor.* [2002] 3 AMR 3457 @ 3486; *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ
D (Rep) 160; *Chow Kok Keong v. PP* [1998] 2 CLJ 469; *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132) it is accepted that s. 2 DDA does not define the word 'trafficking'. It only sets out a number of acts to what that word encompasses. Thus in *Teh Geok Hock v. PP (supra)*, Hashim Yeop Sani CJ (Malaya) in
E the Supreme Court declared:

> True, the definition in the Act sounds artificial and not according to the ordinary meaning of the word 'trafficking' which is normally understood mean to trade in, buy or sell, any commodity, *albeit* often with sinister implication. See also the
F *Shorter Oxford English Dictionary*. The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more
G than passive possession or self-administration of the drug. See *Ong Ah Chuan v. Public Prosecutor*.

[20] This view is somewhat watered down by the later Supreme Court case of *Cohen Lorraine Philis & Anor v. PP* [1989] 2 CLJ
H 956; [1989] 1 CLJ (Rep) 18; *Ng Chai Kem v. PP* [1994] 1 AMR 889; and *Chow Kok Keong v. PP* [1989] 2 AMR 1401, where a defence of self-consumption might be available even where the quality of drugs involved exceeds the limit that triggers a presumption of trafficking.

I

[21] After examining the series of cases touching on the word 'trafficking', Augustine Paul J (as he then was) in *Public Prosecutor v. Mohd Farid bin Mohd Sukis & Anor (supra)* concluded that the courts have held that the word 'trafficking' should retain its ordinary meaning despte being given its extended meaning under s. 2 DDA; and by definffion stated in *Black's Law Dictionary*, 6th edn 'trafficking' is – "Trading or dealing in certain goods and commonly used in connection with illegal narcotic sales". Thus, according to this learned judge "to traffic' imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied".

[22] This view was somewhat shared by Kang Hwee Gee, J in *PP v. Nik Ahmad Aman bin Nik Mansor* [2002] 6 CLJ 369 when he said:

> But by deciding that self-consumption can constitute a good defence to a charge of trafficking, at the very least, one can now be sure that the act of trafficking cannot be equated directly with the acts of transporting, carrying, sending, delivering, procuring, supplying or distributing the drug.
>
> I am persuaded by the reasoning in *Ong Ah Chuan v. PP (supra)* that to prove the accused was trafficking in the context of the instant case it would still be necessary to prove that he transferred or at least intended to transfer possession (or at least custody and control) of the drug to another party. Had it been the intention of the legislature to make the mere acts of transporting, carrying, sending, delivering, procuring, supplying or distributing the drug an offence punishable by death, it would have said so directly in clear language avoiding altogether the word 'trafficking' (emphasis added).

[23] After giving due consideration to the propositions above, we come to the conclusion that when 'procuring' is only one of the acts of trafficking and trafficking having its own ordinary meaning then in order for the prosecution to succeed in a charge for trafficking by procuring, the act of procuring must be connected with the act of trafficking so charged. There must be a nexus between the procurer and the person who supplied the drugs to another who accepted delivery of the supply. This is essential since procuring on its own is not an offence on the charge levied against the 1st appellant; but trafficking is. And for this liaison between procurer and supplier to be of any criminal consequence there must be some kind of agreement or discussion between the procurer and the supplier of the drug as to the type, quality and

quantity of the drug to be supplied. These are significant bearing in mind self-consumption being available as a defence to trafficking (even though the quantity of drugs involved exceeds the limit that triggers the presumption of trafficking) as decided in *Cohen Lorraine Philis & Anor v. PP* [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18; *Ng Chai Kem v. PP* [1994] 2 CLJ 593; and *Chow Kok Keong v. PP* [1989] 2 AMR 1401. Thus if a procurer does not know the quantity or quality of drugs supplied, he cannot be said to be trafficking. Without such knowledge he cannot be said to have intention to traffic in the drug so charged. Thus, it is essential that in order to succeed in a charge for trafficking by procuring to prove the existence of an agreement or discussion between the procurer and the supplier where the type, quality and quantity of the drug to be supplied are ascertained and agreed upon by both such parties before a procurer can be said to be guilty of trafficking in the drug which he is charged.

[24] The prosecution has referred us to a dictum of the Court of Appeal, Criminal Division of England in *Attorney-General's Reference (No 1 of 1975)* [1975] 2 All ER 684, which declares:

> To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take. In our judgment the offence described in this reference is such a case. (emphasis added)

[25] But we wish to point out that the nature of the offence in Attorney-General's Reference (No 1 of 1975) is very different from our instant case. In Attorney-General's Reference (No 1 of 1975), the Court of Appeal, Criminal Division of England was asked:

> Whether an accused person who surreptitiously laced a friend's drinks with double measures of spirits when he knew that his friend would shortly be driving his car home, and in consequence his friend drove with an excess quantity of alcohol in his body and was convicted of the offence under the Road Traffic Act 1972 s. 6(1) is entitled to a ruling of no case to answer on being later charged as an aider and abetter, counsellor and procurer, on the ground that there is no shared intention between the two, that the accused did not by accompanying him or otherwise positively encourage the friend to drive, or on any other ground.

[26] As one can observe by this disclosure, procuring in Attorney-General's Reference (No 1 of 1975) may be an offence standing on its own but in our instant case, procuring is one of the acts of trafficking under s. 2 DDA, and as elaborated earlier, procuring must be connected with the offence of trafficking. The 1st appellant is not charged for procuring under the DDA; he is charged for trafficking and this requires an agreement between the procurer and the supplier of the type, quantity and quality of the drug to be supplied. For this, we are of the view that the proposition cited in this case is not applicable to the facts in our case at hand.

[27] As declared by the learned trial judge, the 1st appellant only acted as an introducer for SP3 to Kan and no further. There is no evidence to prove that the 1st appellant had knowledge of the amount of ganja to be transacted. Though he was in the car when the negotiation took place there is no proof that he had full knowledge of the material substance of the deal. Without knowledge of such material particular he could not be said to have discussed and reached an agreement with the supplier to supply the amount of drugs so specified in the charge for trafficking. On the evidence, he did not even know or at any time have any interaction with the 1st accused or the purported supplier. With this, we find that the learned trial judge has erred in concluding that the prosecution has made out a *prima facie* case against the 1st appellant for trafficking in the said ganja as charged. For this reason as well, we allowed this appeal of the 1st appellant.

2nd Appellant's Appeal

1st Ground

[28] The first ground raised by the 2nd appellant in this appeal is that the prosecution has failed to prove beyond reasonable doubt that the exhibits taken from the scene of the crime were those sent to the chemistry department for analysis and subsequently produced before the trial judge.

[29] Against this assertion, we first examined the finding of the learned trial judge on this issue and then cross checked this against the recorded evidence. Over this matter, the learned trial judge has, in his written judgment, under a sub-heading: 'Rantai pergerakan eksibit' detailed the movement of the 5 packets of ganja commencing from the time when they were taken by DSP Yusuh (SP6) who marked them as 'Y1 to Y5' respectively, then handed

over to ASP Teoh (SP13), the investigating officer, who in turn put them in a box which he marked 'E' before presenting it to the chemist (SP2) for analysis. When these exhibits were with SP2, they were under her surveillance and after the analysis by her, they were returned to SP13. From there SP13 forwarded them to the police store for safe keeping. There they remained until produced in the High Court at the time of trial.

[30] We have checked this finding of the learned trial judge against the evidence recorded and found them to be supportive of the conclusion arrived at. There is no break in the chain of evidence with regards to the handling of these exhibits from the time they were taken out from SP3's car boot to the time when they were produced by the officer in charge of the police store nor was there any suspicious circumstances to infer that they were tampered with. At each stage of handling, these exhibits were properly accounted for and were secured by those who had charge of them. With these, we are of the opinion that there is no merit to this ground of complaint by the 2nd appellant.

2nd Ground

[31] The second ground raised by the 2nd appellant in this appeal concerns the failure of the prosecution to cross-examine the 2nd appellant on his defence for not having got out of SP3's car to handle the ganja, nor spoken to the person standing near the trees at the scene of the crime thereby implying that he has no knowledge of the trafficking. According to his counsel, failure to cross-examine the 2nd appellant over this crucial piece of testimony would tantamount to an acceptance by the prosecution of the truth of what has been uttered. With this, the learned trial judge has misdirected himself when arriving at the conclusion of guilt for the 2nd appellant for, if he did, he should have come to a favourable finding for the 2nd appellant.

[32] We accept that it is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony on what he has asserted. This can be derived from *Wong Swee Chin v. PP* [1981] 1 MLJ 212 where Raja Azlan Shah CJ (Malaya) (as His Highness then was) declared:

A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the creditability of their testimony ... On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as it is common with all general rules, there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* where Haslam J said at page 122:

> In *Phipson on Evidence* (11th edn) para. 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness' testimony, *viz*, where '... the story is itself of an incredible or romancing character, or the abstention arises from mere motive of delicacy ... or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called on the same point, it is not always necessary to cross examine them all.

[33] This rule applies with equal force to witnesses called by the defense. This can been seen from the decision of this court in *Ayoromi Helen v. PP* [2005] 1 CLJ 1, Augustine Paul JCA (as he then was) speaking for the court said:

> This rule would apply with equal force to witnesses called by the defense as well. This is particularly so as there is a duty on the prosecution to negate defences that have been raised and the burden of proof is on the prosecution to prove its case beyond reasonable doubt till the end of the case. This would therefore require cross-examination of evidence given by the defense witnesses by the prosecution in order to discharge the burden it carries.

[34] Further elaboration of this principle can be secured from two other cases. In *PP v. Leong Heo Cheong* [1990] 2 CLJ 818; [1990] 2 CLJ (Rep) 738 where Edgar Joseph Jr. J (as he then was) noted:

> It is settled law that if on a crucial part of the case, the prosecution intends to ask the court to disbelieve the evidence of a witness called for the defence, counsel for the prosecution ought to cross-examine that witness, or at any rate, to make it plain, while the witness is in the box, that his evidence is not to be accepted. (See *R v. Hart* 23 CAR 202). I see no reason why the same principle should not apply – indeed apply even more strongly – to an accused person who testifies on his own behalf.

[35] In *Noor Azahar bin Habin v. Rajaswari a/p Sithampara Pillai & Anor.* [1991] 1 CLJ 151; [1991] 3 CLJ (Rep) 339 Richard Talalla JC (as he then was) after reiterating the principle on this point expounded in the case of *Wong Swee Chin v. PP (supra)* added:

> It is significant that his Lordship described the rule as being general. That in my view is taken to mean that the facts and circumstances of a particular case need to be examined to ascertain whether the rule applies and if so to what extent.

[36] We accept that the propositions disclosed above are the general state of the law on this subject but as cautioned, like all general rules, there are exceptions. These exceptions, as stated, depend on facts and circumstances of each particular case and in *Phipson on Evidence* latest edition (15th edn) it is opined:

> Failure to cross-examine will not, however, always amount to acceptance of the witness's testimony, for example if the witness has had notice to the contrary beforehand, or the story itself is of an incredible or romancing character or the abstention arises from motives of delicacy in the cross-examination of children, or to save time by not putting the same matter to several witnesses. It is open to counsel, and usually safer, to seek the judge's leave not to cross-examine. Similarly, counsel for one of two co-defendants may adopt the cross-examination of counsel for the other.

[37] To evaluate this contention of the 2nd appellant on the failure of the prosecution to cross-examine on this crucial piece of evidence, we must first determine whether there was indeed such failure on the part of the prosecution. To do so we first reverted to the testimony of the 2nd appellant given in examination-in-chief.

[38] The 2nd appellant explained that on 16 April 1998 at about 9.30pm, while waiting for his wife along the main road, a car came by. There were five people in the car: SP3, Zul, 1st appellant, Kan and Pak Long (whom he knew for about a month). He was invited to join this party in the car. This he did. They drove to Bayan Lepas and smoked ganja in the car. While in the car, the 2nd appellant did not join in the conversation that was conducted between SP3 and Pak Long. When he was departing from the car ride, Pak Long requested him to wait in front of the Masjid at 9pm the next day to take two persons to Kampong Dalca.

According to the 2nd appellant, Pak Long did not inform him of the objective. Then on 17 April 1998, as instructed he waited for the two persons in front of the Masjid and when SP3 and Zul turned up he took them to a lane in Kampong Dalca. The 2nd appellant then insisted that:

> Pada esok malam 17hb lepas Isyak saya tunggu mereka. Mereka berdua datang ke Masjid. Saya bawa mereka pergi ke Kg. Dalca, di satu lorong di sana ada rumah kampong. Saya takturun kereta dan taktahu ada seorang menunggu berhampiran rumah ... Mereka keluar dari kereta dan saya taktahu apa mereka buat. Saya kurang perhatikan orang berhampiran rumah itu. Lepas itu mereka hantar saya pulang ke Jalan Perak.

[39] We then perused what was recorded in cross-examination. Except for one answer which was recorded in verbatim, the notes of evidence taken by the learned trial judge during cross-examination of the 2nd appellant are in narrative form. They repeated virtually what was asserted during examination-in-chief of this witness except with elaborations. We reproduced a section of what is recorded that is considered the crucial part with emphasis:

> Saya taktanya Pak Long apa sebab bawa mereka ke sana. Saya dan Pak Long takberhubung selepas arahannya. Saya takbiasa dengan Kg. Dalca. Kami takberbual dalam perjalanan ke Kg. Dalca kecuali menyuruh ikut jalan. Pak Long beritahu saya supaya masuk Lorong ke dua menuju ke Kg Dalca. Kereta saya berhenti di rumah pertama (witness demonstrates). Kereta buat U turn. Saya duduk di belakang. Saya nampak bayangan seorang di tepi rimbun pokok di tepi rumah. Isa (SP3) and Zul turun dan berjumpa orang itu. Saya taktahu apa mereka cakap. Saya nampak mereka kerana ada cahaya lampu. Jarak saya 20 kaki dari orang itu. Saya duduk saja dalam kereta, 10-15 minit. Engin kereta takmati. Mereka naik kereta dan hantar saya balik.

[40] Under s. 268 of the Criminal Procedural Code, evidence recorded need not be taken down in the form of question and answer, a narration is sufficient. Therefore it is up to the trial judge to exercise his preference: either to record it in the format of question and answer or in a narrative manner. The choice is his. When the notes of evidence, as in this case, are in a narrative nature then a reader of the notes would have to deduct from the contents recorded the nature and structure of the questions posed to the witness that drew the character of the recorded narration. In the instant case, with the 2nd appellant's version of the

A events, particularly the crucial portion, already disclosed in examination-in-chief but was once repeated with elaboration in cross-examination then we can only deduced that the questions asked by the learned deputy at the material time during cross-examination were of the nature and form of challenges against the
B version given by the 2nd appellant in his evidence-in-chief. As the learned deputy is not counsel for the 2nd appellant but representing the prosecution, it would be wholly unrealistic and illogical to ask the same questions in order to assist the 2nd appellant to deliver a repeated version of his story when,
C previously, substantial evidence were presented by him to prove directly the opposite of what the 2nd appellant has said on this crucial point *viz.*, it was the 2nd appellant who got out of the car and collected the ganja from the storekeeper and then deposited them in the rear boot of SP3's car. From the nature of the
D recording presented by the learned trial judge in this case on the entire testimony of this witness we are convinced that a challenge has been mounted by the prosecution over this crucial part of the 2nd appellant's evidence.

E **[41]** Further it is our view that the 2nd appellant's version relating to this crucial part of the 2nd appellant's evidence is of an incredible or romancing character against the weight of the evidence tendered. The 2nd appellant has denied that he got out of the car at the material time but yet it was he who led SP3 and
F Zul to the location. And as to why he had to go there was responded by his assertion that Pak Long instructed him to do so without giving any reason or objective. This is highly incredible in the light of the events that transpired on the night of the 16th when the 2nd appellant suddenly discarding his wife (whom he
G was supposed to be waiting for by the main road), got into SP3's car and remained there throughout without hearing the alleged conversation that transpired between SP3 and Pak Long and, then, without any reason, followed Pak Long's instruction to take two men, whom the 2nd appellant did not even know earlier were
H SP3 and Zul, the next day to a destination described by Pak Long. And finally at the destination did not even get out of the car for a good 10 to 15 minutes. All these we find are too incredible and romantic in the light of the evidence advanced in this case. For this, the exception to the general rule that failure
I to cross-examine a witness on a crucial part of the case would amount to an acceptance of that portion of his evidence applies in this case.

[42] With this, the second ground of appeal of the 2nd appellant cannot be sustained.

3rd Ground

[43] The final ground raised by the 2nd appellant in this appeal is that the learned trial judge failed to express in his judgment that the prosecution had: (a) proved a *prima facie* case beyond all reasonable doubt at the end of the prosecution case before calling the 2nd appellant to enter his defence; and (b) proved its case beyond all reasonable doubt (after the defence) before convicting and sentencing the 2nd appellant.

[44] We must remind that the judge's findings are not only derived from his written judgment itself but also from the notes of evidence recorded by him on the case. From these, we find no truth in the first allegation. At p. 7 (p. 171 of the Appeal Record) the learned trial judge had given an extensive and in depth analysis of all the evidence tendered by the prosecution and arrived at the finding that the prosecution has proved a *prima facie* case against the 2nd appellant before calling upon him to render his defence.

[45] Similarly, there is also no truth in the second allegation. At p. 13 (p. 177 of the Appeal Record) the learned trial judge states:

> Pembelaan Kudin (2nd appellant) tidak menimbulkan sebarang keraguan yang munasabah terhadap kes pendakwaan. Saya dapati pendakwaan telah membuktikan kesnya terhadap Kudin melampaui keraguan yang munasabah.

Conclusion

[46] For reasons stated we allowed: (a) the 1st appellant's appeal and quashed his conviction and sentence; (b) dismissed the 2nd appellant's appeal and affirmed his conviction and sentence.